Damages in Investment Treaty Arbitration

Chorzów Factory and beyond: case law update

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1. In a study carried out in 2015, it was found that international tribunals only award on average 37% of the amount claimed, and that the amount assessed by respondent quantum experts on average was only 13% of that assessed by claimants.[1] Given that the field sample was 95 publicly available awards, and therefore more likely than not to be investment treaty awards, it would seem that these figures are broadly reflective of a trend in investor-state arbitration which show a gross disparity between amounts claimed and amounts awarded. The disparity continues to exist in 2018 and if anything is widening.[2]

2. That disparity is attributable to a number of factors, not least the limited use of procedural tools by tribunals to ensure that the issues in dispute are narrowed by the parties before any hearing. But there is also a substantive reason for the disparity, namely the lack of certainty in respect of the detailed principles for assessing the value of an expropriated asset that investment treaty tribunals should adopt. It was as long ago as 1928 that the full reparation standard for unlawful expropriation was established in the seminal case of *Chorzów Factory*, but how exactly damages should be assessed to satisfy that standard continues to create divergent arbitral decisions. The real difficulty that is faced by practitioners in this area is the difficulty in relying on a judgment that is has now reached its ninetieth anniversary and does not fully reflect developments in economic analysis. That difficulty is compounded as the Permanent Court of International Justice ("PCIJ") did not go on to assess quantum as the case was settled after the judgment.

3. This paper considers developments in the approach arbitral tribunals take to the assessment of quantum when applying the measure of damages set out in that case, with a specific focus on the

[1] PWC Damages Assessment, 2015.
[2] See the update to the PWC Damages Assessment, December 2017.

the particularly vexed issue of the valuation date in cases of an unlawful expropriation of an investment. That issue perhaps more than any other continues to produce significant disparities in the quantum claimed and eventually awarded.

4. The choice of valuation date, and more particularly the extent to which a tribunal can rely on information available at the date of expropriation (i.e the *ex ante* approach) or apply hindsight and use information that became available between the date of the award and the date of award (i.e the *ex post* approach) when determining the value of an expropriated, can have significant consequences. For instance, in *Yukos v Russia*,[3] decided in 2014, the valuation date and the difference in outcome when applying either *ex ante* and *ex post* approach made a difference of US$44 billion to the final awarded amount. The paper starts by setting out the general principles that apply to the assessment of damages for unlawful expropriation, before looking in detail at the way tribunals have determined when the valuation date should apply.

THE FULL REPARATION STANDARD

5. *Chorzów Factory* in 1928 established that under customary international law a state should provide "full reparation" to investors for harm caused by internationally wrongful facts. The PCIJ articulated what is now coined as the full reparation standard as follows:

> "*The essential principle contained in the actual notion of an illegal act – a principle which seems to established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it*".[4]

6. It is important to note the distinction drawn between damages and compensation, and unlawful and lawful expropriation. The principle under customary international law of full reparation enunciated in *Chorzów Factory* applies to the assessment of damages for unlawful expropriation and other breaches of investment treaties (the most important being the breach of the fair and equitable (FET) standard. Compensation standards on the other hand for lawful expropriation (i.e those that meet the public purpose tests set out in the relevant bilateral investment treaty (BIT)) are normally set out in the relevant BIT itself, most often by reference to the fair market value ("FMV") of the asset concerned.

[3] *Hulley Enterprises Ltd (Cyprus) v Russian Federation,* PCA Case No.AA 226, Final Award at [1826].
[4] *Factory at Chorzow (Germany v Poland*), Merits, 1928 PCIJ (Ser.A) No.17 (13 September) at [125].

7. The distinction between an unlawful or lawful expropriation therefore makes a very real difference when it comes to the assessment of how much a claimant should be awarded. The prevailing view (at least until the Zimbabwe land expropriation cases in 2015) was that where expropriations have been conducted in accordance with all treaty requirements but merely without payment of adequate compensation that amounts to a lawful expropriation. However, more recently tribunals have suggested if a state refuses to offer any compensation at all or to negotiate in good faith regarding compensation, that outright disregard of its treaty obligations may be sufficient to constitute an unlawful expropriation: see the differing approach between the decision of the tribunals in *Tidewater v Bolivarian Republic of Venezuela* and *Venezuela Holdings v Venezuela* on the one hand, and the *von Pezold v Zimbabwe* decision on the other.[5]

8. On the face of it, the full reparation standard is reasonably clear. But the application of that principle in practice has given rise to a broad range of differing approaches in various Tribunal awards, including the fundamental starting as to what the valuation date should be and whether or not "*ex post*" information should be taken into account.

CHOICE OF VALUATION DATE AND AN EX ANTE/EX POST APPROACH

9. The reason that the final valuation amount is so sensitive to the use of either an *ex ante* or ex post approach is partly as a function of the Discounted Cash Flow ("DCF") analysis, which is now one of the most commonly employed methods of valuing an enterprise. Pursuant to the DCF method, value is calculated by projecting the future stream of free cash flows and then discounting them to take into account the passage of time and risk. Setting the discount rate to reflect that risk and the time value of money is therefore critical.

10. Using an *ex ante* approach, the expected risks and returns, and the assumptions that feed into the discount rate, are set based on what was foreseeable at the date of the expropriation. Using an *ex post* approach, information that only becomes available later, such as significant market fluctuations, can be taken into account. This produces what is sometimes called an asymmetry but in reality is actually a flip side to the same coin: using an *ex post* approach, a State can end up facing liability to pay a far higher award than foreseen at the time, and conversely an investor might not receive any damages at all should the investment prove to have been far less successful than first anticipated. That latter eventuality has been considered unfair by some arbitrators and particularly unpalatable in instances where the State has egregiously and flagrantly breached the relevant Treaty obligations.

[5] *Von Pezold v Republic of Zimbabwe*, ICSID Case No.ARB/10/15, Award at [743] to [744].

11. It is therefore surprising that despite the significance that the valuation date makes to the final amount of damages awarded by tribunals, and despite the increasing frequency of tribunal awards in the last fifteen or so years, that it is still very hard to discern an established approach in tribunal decisions regarding this critical issue.

ADC v HUNGARY AND THE RENAISSANCE OF THE *EX POST* APPROACH

12. Since *Chorzów Factory*, the commonly held position was that in order to provide "full reparation" the valuation date should coincide with the date of the expropriation in question rather than the date of award.

13. However, in *ADC v Hungary*, decided in 2006, the tribunal took a different approach. It held that Hungary had unlawfully expropriated the claimant's investment by issuing a decree that acquired the claimant's airport undertaking. The expropriation was held not to be in the public interest, nor was due process observed, in breach of the BIT in question. The investment had risen in value since the date of the expropriation, and so for that reason the Claimants sought the value of the investment measured as at the award date not the date of the unlawful expropriation. The Tribunal agreed. It held thus:

> *"The present case is almost unique among decided cases concerning the expropriation by States of foreign owned property, since the value of the investment after the date of expropriation (1 January 2002) has risen very considerably while other arbitrations that apply the Chorzów Factory standard all invariably involve scenarios where there has been a decline in the value of the investment after regulatory interference. It is for this reason that application of the restitution standard by various arbitration tribunals has led to use of the date of the expropriation as the date for the valuation of damages.*
>
> *However, in the present, sui generis, type of case the application of the Chorzów Factory standard requires that the date of valuation should be the date of the Award and not the date of expropriation, since this is what is necessary to put the Claimants in the same position as if the expropriation had not been committed."*[6]

14. There is no further analysis as to why the tribunal considered that it was necessary to give the claimants the higher value to put it back in the same position it would have been in "but for" the expropriation.

AWARDS FOLLOWING *ADC v HUNGARY*

15. Following *ADC v Hungary*, at least five tribunals used (or purported to use) the award date as the valuation date, some with little or no further discussion as to why. Whether or not they constitute a majority of decisions is debatable (it was described by Professor Stern in the dissenting opinion

[6] At [496] – [497]

as an "ultra-minority" position).[7] The relevant analysis (such as there is) in those five decisions are considered below, in an attempt to discern any principled basis to support the use of a later valuation date. The counter-position, most forcefully expressed in the dissent by Professor Brigitte Stern in a dissenting opinion in *Quiborax*, is then considered, before some concluding remarks.

Siemens AG v Argentina (2007)

16. In *Siemens v Argentina*,[8] the Tribunal held thus:

> *"The key difference between compensation under the Draft Articles and the Factory at Chorzów case formula, and Article 4(2) of the Treat is that under the former, compensation must take into account "all financially assessable damage" or "wipe out all the consequences of the illegal act" as opposed to compensation "equivalent to the value of the expropriated investment" under the Treaty. Under customary international law, Siemens is entitled not just to the value of its enterprise as of May 18, 2001, the date of expropriation, but also to any greater value that enterprise has gained up to the date of this Award, plus any consequential damages*."[9]

17. However, no further reasoning was provided as to why this should be the case. Further uncertainty as to why the tribunal applied the date of award arises in the way the tribunal went on to assess damages. In the event it valued the assessment as at the date of the expropriation, and in any event decided that the Siemens was not entitled to any loss of profit claim due to the uncertainty of those profits.[10]

El Paso v Argentina (31 October 2011)

18. In *El Paso v Argentina*,[11] the level of damages assessed by the tribunal took into account the increase in crude oil prices after the dates of the alleged breaches.

19. In taking the date of award as the relevant valuation date, the Tribunal referred to the reference in *Chorzow Factory* to the "date of indemnification" and held that:

> *" To pay the value of the property "at the time of indemnification", as stated by the above dictum, means that the property (in our case, El Paso's participation in the Argentinian companies) is to be evaluated by reference not to the time of the dispossession, as in the case of a lawful expropriation, but to the time when*

[7] Dissenting Opinion, September 2015, at [43]. That has been doubted by some: eg Lavaud and Costa, Valuation Date in Investment Arbitration: a fundamental examination of Chorzow's principles, Journal of Damages in International Arbitration, p.58, fn 77.
[8] Siemens AG v Argentine Republic, ICSID Case No. ARB/02/8, Award (6 February 2007)
[9] At [355]
[10] See [377] and the the observations by Professor Stern in the Quiborax dissenting opinion at [48].
[11] El Paso Energy Intl Co v Argentine Republic, ICSID Case No. ARB/03/15, Award (31 October 2011)

> *compensation is paid. Compensation is in fact in lieu of restitution that "has become impossible", so that it should correspond "to the value which a restitution in kind would bear" (as stated by the Chorzów Factory Judgment in the passage cited).the property…is to be evaluated by reference not to the time of dispossession, as in the case of a lawful expropriation, but to the time when compensation is paid [i.e the date of the award] ".*(emphasis added)[12]

20. That decision appears to suggest that the basis for the selection of the date of the award is nothing to do with providing the claimant with an opportunity to claim for a high amount (if value has increased) as per the *ADC* approach. Instead in its references to damages being an alternative to restitution, the tribunal's reasoning suggests that in all cases it should be the date of the award. That is not consistent with ADC, which suggested that it should only apply where the investment had increased.

21. The Tribunal in *El Paso* also went on to rely on the earlier contractual case of *Amoco*[13] (decided in 1990) to justify why a later valuation date should be applied.

22. In *Amoco*, the Tribunal justified the use of a later valuation date because it considered foreseeability was irrelevant to the full reparation test:

> "*Foreseeability not only bears on causation rather than on quantum, but it would anyway be an inappropriate test for damages that approximate to restitution in integrum. The only subsequent factors relevant to value which are not be relied on are those attributable to the illegality itself.".*

23. In making its assessment of damages, the *Amoco* tribunal also stated:

> "*But as to valuation techniques for 1980-1989 the tribunal will not use the perspective of what the reasonable businessman in 1980 could foresee, because for this period it can use known data for relevant factors*.".

24. The analysis that foreseeability is simply an inappropriate test for damages for unlawful expropriation is in my view the most logically coherent explanation for why *an ex post* approach should apply. But it is does sit easily with the established principles regarding causation set out in the ILC Articles on State Responsibility (in particular Article 31). The Commentary to Article 31 makes it clear that "*causality in fact is a necessary but not sufficient condition for reparation. There is a further element, associated with the exclusion of injury that it is too "remote" or*

[12] At [703] – [704]
[13] Amoco International Finance Corporation v Islamic Republic of Iran, reprinted in 15 Iran-US Claims Tribunal, Case No. 189, Partial Award No.310-56-3. 23 July 1987.

"consequential" to be the subject of reparation. In some cases, the criterion of "directness" may be used, in others "foreseeability" or "proximity"." The test of foreseeability described in this extract from the Commentary is well established, and tribunals are likely to be extremely hesitant not to apply it (at least expressly).

ConocoPhilips v Venezuela (3 September 2013)

25. The majority view of the Tribunal in *ConocoPhilips v Venezuela* was that "*the date of valuation is in general the date of the award*". Again, no further reasoning or analysis was provided as to why, and many of the authorities it relied on used a valuation at the date of the expropriation.

Von Pezold[14] (28 July 2015)

26. In Von Pezold, the Tribunal's reasoning for its selection of the Award date was thus

> *The Tribunal accepts that this [the ADC v Hungary approach] is the correct approach to use in this case. The Tribunal is faced with one of those rare cases where the value of the unlawfully expropriated assets has increased from the time of the unlawful expropriation. As compensation is an alternative remedy to restitution (applying if the Respondent does not perform restitution), the sum of compensation should be the financial equivalent to that which would have been returned to the Claimants. This principle was stated by former ICJ President Jimenez de Arechaga and cited by Professor Dupuy in Texaco (see Texaco, para. 102, CLEX-157): "Since monetary compensation must, as far as possible, resemble restitution, the value at the date when the indemnity is paid must be the criterion".*
>
> *In conclusion, the Tribunal considers that compensation should be calculated at the time of the Award, rather than at the time of the unlawful acts. The Tribunal has no difficulty in reaching this conclusion because, as Heinrich's evidence shows (see Heinrich I, paras. 43–538), the Claimants have continually reinvested the returns from their investments. Whoever has ownership of the land (and other assets) has the benefit of that reinvestment.*[15]

27. It is far from clear why the fact that the claimants traditionally re-invested their profits from their landholdings should be a factor in determining the date of valuation, and in particular whether an *ex ante* or *ex post* analysis should apply.

The Yukos Award (July 2014).

28. The saga of the enforcement of the *Yukos* Award against Russia is well known, including its annulment by the ICSID Annulment Committee. However, the reasoning for the selection of the award date as the date of valuation is nonetheless worth considering. The essence of the decision

[14] *Von Pezold v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015)
[15] At [763] – [764]

of the tribunal in *Yukos* to select the date of award lay in what the tribunal saw as a choice that was available to a claimant who had suffered an unlawful expropriation of its investment.[16]

29. The reason for the existence of that choice was stated in the following terms:

> *Neither the text of Article 13 of the ECT nor its travaux provide a definitive answer to the question of whether damages should be assessed as of the date of expropriation or the date of the award. The text of Article 13, after specifying the four conditions that must be met to render an expropriation lawful, provides that for "such" an expropriation, that is, for a lawful expropriation, damages shall be calculated as of the date of the taking. A contrario, the text of Article 13 may be read to import that damages for an unlawful taking need not be calculated as of the date of taking. It follows that this Tribunal is not required by the terms of the ECT to assess damages as of the time of the expropriation. Moreover, conflating the measure of damages for a lawful taking with the measure of damages for an unlawful taking is, on its face, an unconvincing option.*
>
> *In the view of the Tribunal, and in exercise of the latitude that the terms of Article 13 of the ECT afford it in this regard, the question of whether an expropriated investor is entitled to choose between a valuation as of the expropriation date and the date of an award is one best answered by considering which party should bear the risk and enjoy the benefits of unanticipated events leading to a change in the value of the expropriated asset between the time of the expropriatory actions and the rendering of an award. The Tribunal finds that the principles on the reparation for injury as expressed in the ILC Articles on State Responsibility are relevant in this regard. According to Article 35 of the ILC Articles, a State responsible for an illegal expropriation is in the first place obliged to make restitution by putting the injured party into the position that it would be in if the wrongful act had not taken place. This obligation of restitution applies as of the date when a decision is rendered. Only to the extent where it is not possible to make good the damage caused by restitution is the State under an obligation to compensate pursuant to Article 36 of the ILC Articles on State Responsibility*.[17]

30. The reasoning above is questionable, at least in the first paragraph. Firstly, it is hard to see how selecting the same valuation date for damages for unlawful expropriation as the date used to assess compensation for lawful expropriation means that the measure of damages for these different types of expropriation is the same. They are not. Full market value of an asset (i.e the usual measure of compensation for a lawful expropriation) is different to an assessment of loss, including consequential losses, that flow from an unlawful expropriation. A different measure of damages can still apply, albeit with the same valuation date.

31. The reasoning of the second paragraph is more consistent with the earlier decisions, at least in its reference to damages being an alternative to restitution. However, the analysis is conflated with what is essentially a policy consideration, namely the implied suggestion that the State should bear the risk and the Claimant should enjoy the benefits of unanticipated events leading to a change in

[16] At [1763]
[17] At [1765] – [1766]

value between the expropriation and the date of award. Whether that is an appropriate or relevant policy consideration is highly contentious, as discussed below. It highlights the inherent difficulty in assessing in investor-state arbitration in assessing where the balance lies between the interests of the State and the investor: that difficulty resurfaces in particular at the merits stage when applying a proportionality standard in the absence of any constitutional framework against which a State's action should be judged (the balance has been memorably described as a "scale without weights" by one academic commentator).[18]

THE COUNTER-POSITION: THE *QUIBORAX* DISSENT AND *CHORZOW* REVISITED

32. The decisions cited above represent the main examples before 2016 in the public domain where an investment treaty tribunal has applied a valuation date in the case of an unlawful expropriation at the date of the award not the date of the expropriation. There are a handful of other examples where the approach was endorsed albeit not applied as on the facts the tribunal held there were other reasons not to award future loss of profits or because the value of the investment had fallen.[19]

33. The majority decision of the tribunal in *Quiborax v Bolivia*[20] in September 2015 also followed the approach in *ADC v Hungary*. However, that decision was subject to a comprehensive attack in a dissenting opinion by Professor Brigitte Stern. The following is an analysis of that dissent, as it contains a very forceful case for why an *ex ante* approach should apply. It is therefore potentially of assistance for those acting for States who are looking for a principled reason to depart from the ADC approach.

34. The *Quiborax* tribunal held that there had been an unlawful expropriation on the basis that due process had not been followed and that it was discriminatory. In her dissenting opinion, Prof.Stern did not disagree with the final amount actually awarded, but on the method used to quantify the amount of compensation for that unlawful expropriation.

35. She noted the well-established distinction established in *Chorzów Factory* between standard of compensation for a lawful expropriation (i.e just compensation or whatever is specified in the BIT) and unlawful expropriation (i.e full reparation to wipe out the consequences of the illegal act

[18] N Jansen Calamita, Proportionality in Investment Treaty Arbitration, 26th Investment Treaty Forum, BIICL, 19th May 2016

[19] See for example *Gemplus S.A v United Mexican States*, ICSID Case Nos (ARB) (AF)/04/03 and ARB(AF)/04/04. Award (16 June 2010) at 12.43 (investment had fallen in value), *Compania de Aguas del Aconquija SA* and *Vivendi Universal SA v Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007) (uncertainty as to lost future profits), and *Kardassopoulos and Fuchs v Georgia*, ICDIS Case Nos. ARB/05/18, Award (3 March 2010) at [513] (claimant would have sold the investment before the rise in value).

[20] *Quiborax v Bolivia*, Award of 16 September 2015.

and re-establish the situation which would, in all probability, have existed if that act had not been committed).

36. Emphasising the term "in all probability" used in *Chorzów Factory*, the essence of Professor Stern's position was that full reparation in Chorzow Factory should be taken to be "*the one foreseen in all probability at the time of the expropriation*".[21] Her reasoning for that conclusion is helpful for those seeking to argue that an *ex ante* approach is the standard approach and should be followed in the absence of exceptional circumstances.

37. Her real issue with the majority decision was not so much the date of valuation in itself, but rather the use of hindsight (i.e the use of an *ex post* approach). Her starting point is that in her view full reparation in *Chorzow Factory* only meant probable profits until the date of judgment, which should be added to the value lost on the date of expropriation. In her view there was no support in *Chorzow Factory* for an approach that would include taking into account loss profits after the date of judgment. She said the following in terms:

> *"I will start by a review of the finding of the PCIJ…first I think it is worth noting – to put things in perspective – that if the Court indeed considered that in case of an unlawful expropriation, the full reparation implied the payment of a compensation including what was called the damnum emergens and the lucrum cessans, it has not considered any "future" lost profits, taking only into consideration probable profits lost between the date of the expropriation and the date of the judgment..* ***In other words, in no case did Chorzow take into account lost profits AFTER the date of judgment***". (bold in original)

38. She drew this conclusion by looking at how in *Chorzow Factory* the PCIJ set out two potential questions which it considered would be relevant to try to ascertain the level of damages for unlawful expropriation. The PCIJ considered there were two alternative ways of assessing these, both of which in its view would have come to the same result:

> *I. - A. What was the value, on July 3rd, 1922, expressed in Reichsmarks current at the present time, of the undertaking for the manufacture of nitrate products of which the factory was situated at Chorzów in Polish Upper Silesia, in the state in which that undertaking (including the lands, buildings, equipment, stocks and processes at its disposal, supply and delivery contracts, goodwill and future prospects) was, on the date indicated, in the hands of the Bayerische and Oberschlesische Stickstoffwerke?*
>
> *B. What would have been the financial results, expressed in Reichsmarks current at the present time (profits or losses), which would probably have been given by the*

[21] Dissenting Opinion at [24].

undertaking thus constituted from July 3rd, 1922, to the date of the present judgment, if it had been in the hands of the said Companies?

II. - What would be the value at the date of the present judgment, expressed in Reichsmarks current at the present time, of the same undertaking (Chorzów) if that undertaking (including lands, buildings, equipment, stocks, available processes, supply and delivery contracts, goodwill and future prospects) had remained in the hands of the Bayerische and Oberschlesische Stickstoffwerke …[22]

39. In relation to the second approach, the PCIJ had said the following:

As regards the lucrum cessans, in relation to Question II, it may be remarked that the cost of upkeep of the corporeal objects forming part of the undertaking and even the cost of improvement and normal development of the installation and of the industrial property incorporated therein, are bound to absorb in a large measure the profits, real or supposed, of the undertaking. Up to a certain point, therefore, any profit may be left out of account, for it will be included in the real or supposed value of the undertaking at the present moment. (emphasis added)[23]

40. That passage from *Chorzów Factory* in the view of Prof. Stern should be taken to mean that no such lost profits should be applied to a valuation at the date of the judgment, i.e if the second approach is followed. She summarised the PCIJ's approach thus:

It is interesting to note that in fact the PCIJ has used two methods of calculation of the compensation due to replace restitution in case of unlawful expropriation:

- one on the date of the taking, considering that compensation should be calculated as including the assets-based value of the undertaking at the moment of the interference plus the hypothetical probable lost profits until the date of the judgment;

- one on the date of the judgment, this hypothetical assets-based valuation being supposed to include ipso facto most of the hypothetical probable lost profits up to the date of the judgment.[24]

[22] Chorzow Factory, at pp. 51 – 52,
[23] Ibid at p.53
[24] *Quiborax* Dissenting Opinion, para. 33

41. Whether that is a fair summary of the PCIJ judgment is open to debate. In particular, it is not entirely clear whether the reference to "any profit may be left out of account" really should be taken to mean that no such loss profits in principle should be added to a valuation formed at the date of the judgment.

42. Either way, it is clearly arguable that the valuation exercises envisaged by the PCIJ were intended to be hypothetical, i.e it referred to the value of the undertaking if it had remained in the hands of the expropriated owners. The Tribunal in *Amoco* provides some support for this reading of the PCIJ judgment.[25]. Prof. Stern concluded:

> *Moreover, I think that, if the PCIJ clearly suggested that a possible method was to use the date of the award to evaluate the expropriated property, it does not seem that the PCIJ had considered the possibility to use ex post information. It always insisted on the fact that the evaluations were to be made "in all probability", which to me, might well exclude the taking into account of real data.* ***The purpose of the reparation is to compensate the consequences of the illegal act of the State, as appreciated at the time of such expropriation, not the consequences of some posterior evolution of prices or evolution of demand or other circumstances.***[26]

43. Whether or not the words "in all probability" justify the importation of the test of foreseeability into the full reparation standard to the exclusion of any *ex post* data remains open to debate. Perhaps the most telling observation in the *Quiborax* dissenting opinion is the observation that the development of more sophisticated economic tools and economic analysis has meant that the distinction between past loss (damnum emergens) and loss of profits (lucrum cessans) is now far more blurred. The advent of the DCF valuation calculates value using the sum of all future cash flows discounted to give their present values. That necessarily means that the present value of the company entails some element of loss profit, which on the face of it the PCIJ thought could be largely (if not entirely) disregarded. What this really suggests is the *Chorzow Factory* has perhaps outlived its usefulness as a clear guide to the detailed valuation exercises undertaken in these disputes, and that a better approach is go back to first principles.

44. The main arguments, as summarised in the *Quiborax* dissent, against the use of *ex post* data, are as followed:

[25] *Amoco International Finance Corporation v Islamic Republic of Iran*, reprinted in 15 Iran-US Claims Tribunal, Case No. 189, Partial Award No. 310 -56-3 24 July 1987, at [204]
[26] At [40]

a. *Ex post* analysis is biased in favour of investors (if a choice as to valuation date is available).

b. It is arbitrary: "the facts existing after the date of the award have nothing to do with the facts of the case".[27]

c. The amount of damages varies with the date of the award.

d. It can result in injustice to the expropriated investor (if used in all instances), because there may be later, external events which severely diminished the value of the investment.

e. Ruling out foreseeability is contrary to the rules as to causation (see the Commentary to Article 31 to the ILC Articles on State Responsibility). Unanticipated market fluctuations do not flow from the illegal act.[28]

DECISIONS FOLLOWING *QUIBORAX*

45. Since *Quiborax*, the trend in arbitral decision making appears to be that the claimants ought to retain the choice in deciding whether or not to apply a later valuation date.[29]

46. The only real engagement with the views expressed in the *Quiborax* dissent can be found in the majority decision in *Burlington Resources Inc v Republic of Ecuador*.[30] The tribunal (which adopted an ex post analysis) grappled with the objection that using information post-dating the expropriation would conflict with the requirement of causation (and the associated test of foreseeability). Its answer to the *Quiborax* dissent was that:

> "*the fact that some of the information used to quantify lost profits on the date of the award may not have been foreseeable on the date of the expropriation does not break the chain of causation. What matters is that the injury suffered must have been caused by the wrongful act. It is true that factual causation is not sufficient, and that an additional element linked the exclusion of injury that it is too remote or indirect (sometimes referred to as legal or adequate causation) is required, and it is in this context where foreseeability plays a role…it is generally accepted that the expropriation of a going concern is objectively capable of causing the loss of its future profits stream, and thus this loss is foreseeable. It is also foreseeable that these future profits may fluctuate depending on various economic and other variables including prices, costs, inflation and interest rates, among others*".[31]

[27] *Quiborax* Dissenting Opinion at [83]
[28] *Quiborax* Dissenting Opinion at [99].
[29] See for example *Murphy v Ecuador*, Partial Final Award, 6 May 2016 at [484] – [485].
[30] ICSID Case No. ARB/08/05 at [330] to [337].
[31] At [333]

47. In other words, what the *Burlington* tribunal suggested was that in an *ex post* analysis, any subsequent change to the market or external variable factors ought to have been foreseeable in any event. On that basis, any additional losses caused by those factors were caused (in both the factual and legal sense of that word) by the breach of the relevant BIT. Thus, on that analysis, there is no conflict with the foreseeability requirement as set out in the ILC Articles.

48. That analysis is questionable as a matter of logic. There may be events that are entirely unforeseeable at the date of expropriation. The contortion of logic in the suggestion that any events subsequent to the date of the breach of the BIT are in principle foreseeable is yet again a result of the relatively undeveloped set of principles that follow on from *Chorzów Factory*. It may be that what the Burlington tribunal was in fact driving at is that foreseeability applies to the type of damage, but not to sort of factors that may affect the level of damages. An alternative, perhaps more principled approach may simply be to recognise that the requirement for causation and foreseeability of loss set out in the ILC Articles on State Responsibility (which does not make any distinction between types or degrees of international law breaches) in cases of unlawful expropriation ought to be revisited as they are not consistent with the true reparation standard set out in *Chorzów* Factory, which imports as it does a requirement for <u>all</u> consequences to be wiped out. However, departing from the well established principles in the ILC Articles has hitherto been a step too far for most tribunals to take.

CONCLUSION

49. This article has sought to set out some of the main decisions discussing the measure of damages established in *Chorzów Factory* specifically in the context of an analysis of whether an *ex post* or *ex ante* approach should apply to valuation. Despite the strong dissent in *Quiborax*, the *ex post* approach seems set to stay, yet it seems that tribunals will continue to struggle to successfully and categorically identify a robust and principled basis for that approach that is consistent with the established rules set out in the ILC Articles on State Responsibility and is consistent with *Chorzów Factory*. There is a clear policy consideration that would justify claimants exercising a choice to take advantage of a later valuation date if that suited them, namely the need to deter States from flagrantly breaching their Treaty obligations towards investors. But whether that is an appropriate policy consideration in the context of a claim for breach of a bilateral investment treaty (by tilting the balance too far in favour of the investor) is another matter.

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Landmark Chambers

21 March 2018